

United States Court of Appeals

For the Ninth Circuit

CALDWELL FINANCE CO.,

Appellant

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERRERID, Bankrupt.

Appellee

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANT

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INDEX

	Page
Statement of pleadings and facts upon which Jurisdiction is Based	1
Statement of Case.....	3
Contention of Parties	5
Specifications of Error Relied Upon.....	5
Summary of Argument	5
Argument	6
(1) The conduct of the parties.....	7
(2) The attendant circumstances.....	9
(3) The terms of the agreement.....	11
Conclusion	12

Table of Authorities Cited

Court Decisions:

Kliks v. Courtemanche, 150 Ore. 332, 43 P2d 913.....	6
Manley Auto Co. v. Jackson, 115 Ore. 396, 237 Pac. 982.....	6
McKaig v. Commercial Credit Co., 126 F 2d 68.....	12
Meier & Frank Co. v. Sabin, 214 F 231, 130 C. C. A. 605.....	6
Norman Thiex Inc. v. General Motors Acc. Corp., 259 N.W. 855.....	11
Wickwire v. Hanson, 133 Ore. 85, 288 P. 404.....	12

Statutes, Texts and Miscellaneous:

Title 11 USCA, Section 11	3
Title 11 USCA, Section 47.....	3
Oregon Revised Statutes 46.360(3)	
U. S. Supreme Court Digest Sect. 25 p. 159.....	13
11 Corpus Juris. 412	6

No. 14453

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BRIEF OF APPELLANT

STATEMENT OF PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

On October 19, 1953, Oscar Herman Herreid was adjudicated a bankrupt and subsequently a Trustee was appointed.

The Trustee caused an order to be served on

Caldwell requiring him to appear and show cause why two certain International Trucks (One 1950 Model and one 1951 Model) should not be sold free and clear of encumbrance.

With the consent of both the referee and the claimant the trustee was permitted to sell the vehicles with the right reserved to Caldwell to claim the proceeds in the event his right was determined to be superior to that of the Trustee in bankruptcy.

To facilitate this procedure Caldwell surrendered to the Trustee the title certificates held by him.

After the referee in bankruptcy held the Trustee's title was superior to that of Caldwell Finance Co. Caldwell petitioned the United States District Court for the District of Oregon for a review of the order of the Referee in Bankruptcy.

The Referee certified the matter to the United States District Court for the District of Oregon, for review and that court entered its Order affirming the order of the Referee in Bankruptcy (Tr. p. 15).

From the order of the District Court the petitioner appeals. (Tr. p. 16.)

Jurisdiction of the Court below is based upon the Congressional Act of July 1, 1898, C 541, Sect. 2, 30 Stat. 545 as amended. Title 11 USCA Section 11.

Jurisdiction of this Court is based upon the Congressional Act of July 1, 1898, C 541 Sect. 24, 30 Stat. 553 as amended. Title 11 USCA Section 47.

STATEMENT OF THE CASE

By agreement of counsel only one question is presented for review by this court.

“Was the interest of Caldwell Finance Co. in two International Trucks superior to that of the Trustee in Bankruptcy.”

The facts are undisputed and are:

Caldwell held a recorded chattel mortgage on a Mack Truck owned by the bankrupt Herreid, which secured a debt of \$2500.00.

On July 15, 1953, Herreid desired to trade the Mack Truck to International Harvester Co. for five used trucks. Caldwell consented to the trade.

Two of the five trucks were immediately sold and \$500.00 was paid to Caldwell reducing his mortgage to a balance of \$2000.00. These two trucks were not included in the bill of sale or conditional sales contract involved in this case.

The remaining three pieces of equipment were covered by bills of sale (Tr. p. 5, para. 7 (1)). Exhibit (Tr. p. 10) was the identical form used for the three trucks remaining.

Three certificates of title and the three bills of sale were delivered by Herreid to Caldwell covering each of the three vehicles and held by him continuously until voluntarily surrendered to Trustee under the agreement for sale.

At the same time (July 15, 1953) Herreid executed a certain conditional sale contract (Tr. p. 14).

Subsequently, the Ford truck was sold leaving

the question of priority as to the two International trucks only.

CONTENTION OF PARTIES

The trustee contends he is entitled to the trucks free and clear of any lien of Caldwell Finance, and that Caldwell should be construed to be a general creditor in the bankruptcy.

Caldwell contends that he is a secured creditor entitled to his preference.

SPECIFICATIONS OF ERROR RELIED UPON

Appellant contends the lower court erred in affirming the findings of the referee holding that appellant was a general creditor in bankruptcy.

SUMMARY OF ARGUMENT

Appellant contends that the intentions of the parties govern and that where the intention is clear to give a conditional sale contract that intent will be given effect and the general creditors will not be permitted to secure the benefit of a windfall

which was never intended at the expense of a creditor who was secured.

ARGUMENT

The law in many jurisdictions construes conditional sales contracts to be chattel mortgages and requires recording. This is not the rule in Oregon. A conditional sale in Oregon need not be filed or recorded (*Meier & Frank Co. v. Sabin*, 214 F. 231, 130 C.C.A. 605).

In Oregon conditional sales contracts are given effect in accordance with the intent of the parties. (*Kliks v. Courtemanche*, 150 Ore. 332 at page 341 quoting 11 C. J. 412, *Manley Auto Co. vs. Jackson*, 115 Ore. 396 at 399, 237 Pac. 982.)

It is conceded if the intent of Caldwell and Herreid was that a chattel mortgage be created, then the ruling of the lower court was correct and this appeal should be dismissed. If the intent was that a conditional sale be created, the ruling of the lower court should be reversed with instructions to order the referee to pay to petitioner (Caldwell) the proceeds from the sale of the trucks.

We quote the Oregon rule as stated in the *Kliks v. Courtemanche* case, *supra* p. 341:

“Whether a transaction constitutes a chattel mortgage or a conditional sale depends on the intention of the parties which must be ascertained from their conduct and the attendant circumstances as well as from the terms of the agreement.”

Under this rule, we must look to:

1. The conduct of the parties —
2. The attendant circumstances —
3. The terms of the agreement.

We will examine these three points in the light of the undisputed and admitted facts:

1. **The conduct of the parties.**

Herreid

Herreid desired to trade a Mack truck for five used trucks. The Mack truck was encumbered by a mortgage held by Caldwell. In order to make the trade, the Mack Truck had to be clear, and Herreid requested that Caldwell release his mortgage.

Caldwell

Caldwell agreed to the release of the chattel mortgage which was duly recorded under an agreement that two of the trucks would be sold and \$500.00 paid on the amount due Caldwell and on the further agreement that International Harvester would execute a conditional sale contract on the remaining three pieces showing a balance due in the same amount as Caldwell's balance then due from Herreid, and that the conditional sales contract be assigned to Caldwell.

Said sale contract showing International Harvester as seller and Herreid as buyer which Herreid signed (Tr. p. 14). When the conditional sale contract which was to be signed by International was presented to it for signature, they advised that their regulations prevented the signing of such forms unless the contract was being financed through its own financing agency but did execute bills of sale for each piece of equipment to both Caldwell and Herreid and delivered the certificates of title to Caldwell with Herreid's consent.

Herreid voluntarily surrendered and delivered

to Caldwell all of the documents pertaining to the title to the vehicles — 1—certificates of title; 2—bills of sale; 3—original copy of the conditional sales contract. These are all consistent only with intent to create the ownership in Caldwell, subject only to Herreid's interest in the vehicles under his conditional sales contract which he delivered to Caldwell.

Payments were not intended to be and were never made to International Harvester.

2. The attendant circumstances.

It must be remembered that Caldwell had a valid prior chattel mortgage on another piece of equipment. Caldwell knew of the recording statutes of Oregon because it had recorded the previous chattel mortgage which it held on the Mack truck owned by the same bankrupt, and would surely have recorded the sales agreement if the parties had intended that it was to stand as a chattel mortgage.

It must be assumed that the parties deliberately chose the form of instrument which they did when

the conditional sales contract was signed and that they intended to be bound by its terms. The Oregon law so provides.

Section 46.360 (3) O. R. S. provides that a jury is bound to find according to the presumption unless overcome by other evidence. There being no other evidence, the following presumption is applicable.

“A person intends the ordinary consequences of his voluntary act.”

As between the parties to the contract, Caldwell and Herreid, there can be no question but what it was originally intended by both Caldwell and Herreid that International should sell the vehicles to Herreid under the conditional sale contract which would then be assigned to Caldwell. This is demonstrated by the typed signature of International Harvester on the conditional sale contract. If this had been done, the trustee would have raised no objection.

When International refused to execute the agreement because it had its own financing agency,

the parties then agreed that title should go to Caldwell who would become the conditional seller.

The parties themselves intended and did transfer the titles to Caldwell who then stood in the place of International Harvester.

It is true that Caldwell at the time of the bankruptcy had not substituted its name for the typed name of International Harvester, but this is unimportant since equity "will regard that done which ought to be done," and a person is authorized to complete the blanks in a document in accordance with the intent of the parties (*Norman Thiex Inc. v. General Motors Acceptance Corp.* 259 N. W. 855).

3. The terms of the agreement.

The terms of the agreement are consistent only with a conditional sale contract.

Paragraph one of the agreement (Tr. p. 14) provides that title should not pass to purchaser (Herreid) until all payments . . . are fully paid in cash.

This provision in a conditional sale contract has been held to be inconsistent with passage of

title by absolute sale and complete delivery of possession with a bare mortgage back. (McKaig v. Commercial Credit Co., 126 F. 2d 68.)

In paragraph 4 of the agreement, the question of title is again set forth as follows:

“Possession of said property shall give the purchaser no title or interest therein and no rights except as herein provided.”

The court will enforce the terms of the conditional sales contract as agreed on between the parties. (Wickwire v. Hanson, 133 Ore. 85, 288 P. 404.)

CONCLUSION

From the foregoing, it must conclusively follow that the parties intended to create a conditional sales contract, and the intention of the parties govern.

It is conceded that an unrecorded conditional sales contract is valid as against a trustee in bankruptcy.

Since the parties intended to and did create a

conditional sales contract and since an unrecorded conditional sales contract is valid in Oregon as against a trustee in bankruptcy, it conclusively follows that Caldwell should not be deemed to be a general creditor in bankruptcy.

Such a ruling would be unjust and inequitable. The bankruptcy courts are courts of equity, and are guided by equitable doctrines and principles. (U. S. Supreme Court Digest, Section 25, p. 159 citing Securities & Exchange Comm. vs. U. S. Realty and Improv. Co., 310 U.S. 434, 60 S. Ct. 1044, 87 L. ed. 1293 and American United Mut. L. Ins. Co. vs. Avon Park, 311 U.S. 138, 61 S. Ct. 157, 136 ALR 860, 85 L. ed. 91 and others.) Caldwell had been a secured creditor for a period of several years. No transaction in which Caldwell was involved operated to the detriment of the bankrupt estate. At the time of the trade of the Mack truck, the bankrupt was indebted to Caldwell on a secured obligation in the principal sum of \$2600.00. Through sales of equipment and on payment of \$100.00, this principal obligation was reduced to \$1200.00. The trucks were sold by the Trustee in bankruptcy with consent of Caldwell for \$750.00. Caldwell will lose in any event. His loss will be

\$450.00 even if the proceeds of the sale are paid to him.

The court should note that this is a loss of capital to Caldwell and does not consider the interest due under the contract which would be substantially in excess of this figure. If Caldwell is not permitted to receive the proceeds of the sale of the equipment, the bankrupt's estate will be unjustly enriched.

There are no intervening rights of bona fide purchasers involved. The dispute is solely between the bankrupt's estate and a creditor who was secured long before the bankruptcy petition.

The facts are undisputed, the law is clear and the only legal point in question has been stipulated by counsel. Under these circumstances, the court should order the proceeds of the sale of the equipment paid to Caldwell to reduce his loss as much as possible and in justice and equity to both Caldwell and the general creditors of the bankrupt.

Respectfully submitted,

WARDE H. ERWIN,

Barzee, Leedy, Keane & Erwin